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Analysis

EdinLR Vol 17 pp 63-68

Lessons in Scots Law: The Common Good School

Ultra vires. Those two Latin words cause more than a little concern for anyone dealing with a legal entity whose existence and powers derive from statute. They may also scupper any grand plans of the officers of such a legal entity. An attempted dealing of a legal person straying beyond the realms of its powers, and therefore acting *ultra vires*, is ripe to leave purported counterparties in an unhappy place. In that unhappy place they will find no consolation from the fact that they only got there because of a highly remote or idiosyncratic constellation of facts: although the gap may be but an inch wide, it is a mile deep.

Statute may provide reassurance in some contexts, such as the declaration in section 39 of the Companies Act 2006 that an act of a company “shall not be called into question on the ground of lack of capacity by reason of anything in the company’s constitution”; or the certification route that exists in the Local Government (Contracts) Act 1997. However, these situational exceptions will not assist beyond their narrow confines. No such reassurance was available in the case of *Portobello Park Action Group Association v The City of Edinburgh Council*,¹ where a local authority’s decision to appropriate part of its (inalienable) common good land at Portobello Park in Edinburgh to build a new school was challenged by a group of local residents. In the Inner House the residents’ association was successful in its reclaiming motion from an earlier decision of the Outer House,² leading to a reduction of the appropriation as *ultra vires*. As shall be seen below, this did indeed involve an idiosyncratic constellation of facts, hinging on the treatment of inalienable common good land, but the effect is to leave the scheme predicated on the appropriation trapped in a narrow but rather deep gap. How did this come to pass?

A. COMMON GOOD LAND

Which (predominantly immovable) assets are comprised within the common good?³ To explain that in a complete manner would render this a very long article

1 [2012] CSIH 69; 2012 GWD 30-622 (hereafter “*Portobello*”).

2 *Portobello Park Action Group Association v City of Edinburgh Council* [2012] CSOH 38, 2012 SLT 944.

3 The term common good land is slightly broad-brush, but it is normally as apposite as the wider term of common good assets. *Magistrates of Dumbarton v University of Edinburgh* 1909 1 SLT 51 is identified

indeed,⁴ but ironically the sub-category of inalienable common good land seems somewhat easier to define. For present purposes it can be noted that inalienable common good assets comprise certain things within the remit of the local authorities established by the Local Government (Scotland) Act 1973 that (a) were granted to them (or a predecessor burgh) according to certain terms; (b) by the actions of the local authority in appropriating the thing for public uses; or (c) have been used and enjoyed by the public from time immemorial.⁵

Turning to the incident case, Portobello Park was acquired by predecessors of the City of Edinburgh Council (“the Council”) in 1898, with the terms of that grant being such as to render the land’s status as inalienable common good land non-contentious in the litigation.⁶ Desirous of upgrading the schools in its area, the Council planned and designed a new Portobello High School to be sited on Portobello Park. After much preparatory work, planning permission was granted on 23 February 2012 and a contractor was appointed. Perhaps cognisant of the fact that there were some murky common good issues to contend with, the contractor did not start work. Fairly soon after the Council’s plans were first mooted, some local residents formed an unincorporated association, the Portobello Park Action Group Association (“the Association”) to keep Portobello Park scarce a school. At various stages of the proposed school’s development they requested information and clarification of matters from the Council utilising the Freedom of Information (Scotland) Act 2002,⁷ before ultimately taking the step of a judicial review.

by Ferguson as the only reported case involving a common good corporeal moveable. See A C Ferguson, *Common Good Law* (2006) para 4.1.

4 Although not referred to in the judgment, the most important contemporary legal source on the common good in Scotland is Ferguson, *Common Good Land* (n 3). See also A Ferguson “Common good land” 2000 SLT (News) 7; A Wightman, *The Poor Had No Lawyers: Who Owns Scotland (And How They Got It)* (2011) ch 23; and A Wightman and J Perman, *Common Good Land in Scotland: A Review and Critique* (2005), available at http://www.andywightman.com/docs/commongood_v3.pdf.

5 *Murray v Magistrates of Forfar* 1893 1 SLT 105. The curious approach of defining the narrower category then the broader category is adopted from Ferguson. On the broader term, see Ferguson, *Common Good Land* (n 3) ch 5, and Wightman and Perman, *Common Good Land* (n 4) at 12, with reference to the *locus classicus* of *Magistrates of Banff v Ruthin Castle* 1944 SC 36, noting that the most consistent interpretation is that all burgh property falls into the common good except for property acquired under a specific statutory provision for that purpose or property acquired subject to a specific non-common good trust.

6 Andy Wightman has suggested in his blog that this should have been a point of contention, see “Is Portobello Park common good land?”, 23 Sep 2012, available at <http://www.andywightman.com/?p=1636>. Subsequent discussions of the Council suggest that there may be an argument that it is not inalienable common good land, per the Agendas, Reports and Minutes of the Council for 25 October 2012, item 8.1 “The new Portobello High School and new St John’s RC Primary School”, available at http://www.edinburgh.gov.uk/meetings/meeting/2814/city_of_edinburgh_council at 3.1.10-3.1.11. It seems a court challenge to the categorisation is now unlikely, see: http://www.edinburgh.gov.uk/info/20101/schools_buildings/1636/new_portobello_high_school.

7 See the following decisions of the Scottish Information Commissioner: 002/2008 (Ms Diana Cairns and the City of Edinburgh Council) Case No: 200700376, 10 January 2008; 079/2009 (Ms Diana Cairns and the City of Edinburgh Council) Reference No: 200900533, 9 July 2009; and 167/2012 (Mr Archie Burns and the City of Edinburgh Council) Reference No: 201200584, 11 October 2012, all available at www.itspublicknowledge.info.

B. THE DISPUTED APPROPRIATION

The Council sought to fend off the judicial review challenge with two key devices. It first argued that the Association was too late and docile with its objection and, therefore, the challenge fell on the basis of *mora*, taciturnity and acquiescence.⁸ This was successfully pleaded at first instance, a decision that was “perhaps unsurprising” in the words of one commentator.⁹ The Outer House ruling was made with reference to the initial Council decision to use Portobello Park in March 2010, but the Inner House did not use that as the reference date and instead looked to the subsequent grant of planning permission.¹⁰ With that later trigger of February 2011, not to mention the acknowledged “regular statements” of opposition that “can scarcely be categorised as taciturnity”,¹¹ the *mora*, taciturnity and acquiescence argument became far more precarious and was not sustained.¹²

This left the more vexing issue of whether the appropriation of undeveloped inalienable common good land for the purpose of a modern school was valid. A statutory code¹³ provides the general starting point that local authorities can deal with their land as they see fit (sections 73-74 of the 1973 Act), but section 75 specifically regulates the “disposal, etc, of land forming part of the common good.” Where the land is alienable common good, a transfer, lease, or appropriation (i.e. the reallocation from one use to another without transferring ownership) can take place without any question arising as to a local authority’s *vires*. Section 75(2) then details the only statutory provision where a local authority wishes to “dispose of land” (no reference is made to appropriation) and “a question arises as to the right of the authority to alienate”. In such a situation application can be made to the Court of Session or the sheriff¹⁴ and there is a very wide power to sanction a transfer.¹⁵

And that is where the statute, perhaps curiously, ends. It says nothing further about appropriation, which is clearly envisaged to be the use of common good land for another function without a transfer of ownership. It also says nothing about an alienation which, as acknowledged by Ferguson, might be neither an appropriation nor a disposal for the purposes of the statute, such as a ten year lease which would fall short of an outright disposal, but that is a point for another day.¹⁶ Staying with the

8 Two recent articles show that aspects of this doctrine cause some concern, particularly in light of the European decision Case C-406/08, *Uniplex (UK) Ltd v NHS Business Services Authority*. See G Downie, “Calling time on *mora*” (2010) 55 JLSS May/54 and R Seaton, “*Mora no more*” (2012) 57 JLSS Jan/27. See also *Pocock’s Trustee v Skene Investments (Aberdeen) Ltd* [2012] CSIH 61.

9 The commentator in question being a key authority on common good law, namely A Ferguson, “Common good land, *mora* and appropriation” (2012) 152 SPEL 88.

10 *Portobello* at para 17, with reference to *R (Burkett) v Hammersmith & Fulham London Borough Council and another* [2002] 1 WLR 1593.

11 Para 19.

12 Reference was also made to *Somerville v The Scottish Ministers* 2007 SC 140, to explain that all three elements of the plea must be present to allow a plea to be sustained: see para 13.

13 The Local Government (Scotland) Act 1973.

14 J McFadden, *Local Government Law in Scotland: An Introduction*, 2nd edn (2008) at para 4.38.

15 *East Lothian District Council v National Coal Board* 1982 SLT 460; *West Dunbartonshire Council v Harvie* 1998 SC 789.

16 Ferguson, *Common Good Land* (n 3) ch 6.

appropriation point that is relevant to *Portobello*, does this imply there is some kind of gap where the court has no authorising power? Is there a legislative lacuna?

Ferguson suggests that there is.¹⁷ The joint opinion of two senior counsel to the Council, obtained by an interested party under the Freedom of Information (Scotland) Act 2002, argues that there is not.¹⁸ Although Ferguson is not referred to in the judgment his view seems to prevail in the Inner House, but not without qualification.¹⁹ Ferguson argues that a local authority faced with a situation where there is an attempt at alienation or appropriation that falls short of disposal has two “stark” choices.²⁰ The first is to seek declarator that the land is not part of the inalienable common good either because it never was or because societal circumstances have somehow intervened over time.²¹ Alternatively, a case could be made that section 20 of the Local Government in Scotland Act 2003 would apply as the dealing advances the well-being of the local area or its inhabitants. Leaving aside the well-being argument for the moment, it would seem that *Portobello* adds (or at least re-identifies) the possibility of a court sanctioning an appropriation as not being in breach of a local authority’s fiduciary obligations at common law. It can, therefore, be seen that the 1973 Act is not treated as a fresh start from whence all inalienable common good questions are to be determined. It should also be noted that the Inner House promptly ruled against the “fall-back” position of the Council, namely that its plans were not a “substantial interference” and were therefore compatible with earlier authorities.²² The contrast with the first instance decision, where Lady Dorrian opined (*obiter*) that the power to appropriate inalienable common good land was unfettered, is marked.²³

Two other points fall to be mentioned. The first relates to two Lanarkshire cases. In the unreported case of *South Lanarkshire Council, Petitioners*²⁴ section 75(2) approval was sought for a Public Private Partnership scheme (for a school on common good land) that included a lease/leaseback arrangement, but this was deemed not to be necessary as it was not a disposal. The Outer House decision in *North Lanarkshire Council, Petitioners*²⁵ is to a similar effect. In light of *Portobello*, this does beg the question of whether something else was necessary to allow a scheme short of a disposal to proceed but, as Ferguson noted in

17 Ferguson, *Common Good Land* (n 3) para 6.4. See also A Ferguson, “Alienation and the appropriation of common good land” 2009 SLT (News) 235.

18 This opinion, dated 19 November 2008, is available at <http://www.whatdotheyknow.com/request/130042/response/318177/attach/4/FoI%20Ref%20455327%20Kindness%20redacted%20data%20img07757.pdf>.

19 *Portobello* at para 30, with reference to *East Lothian District Council v National Coal Board* 1982 SLT 460.

20 Ferguson, *Common Good Land* (n 3) para 8.5.

21 A point discussed by Ferguson, *Common Good Land* (n 3) at para 7.3.

22 *Portobello* at para 36.

23 See Ferguson (n 9).

24 11 Aug 2004.

25 2006 SLT 398.

2009, “whether the particular facts and circumstances of either Lanarkshire case constituted alienation or appropriation, challengeable by a burgh resident, was never addressed.”²⁶

The final point worth noting is the advancement of well-being power conferred by the 2003 Act, in which the Council was again unsuccessful. Although the power is apparently wide-ranging,²⁷ the Inner House had “no hesitation”²⁸ in concluding that the 2003 Act conferred no relevant power on the Council for the purported appropriation, the section being treated not as a blanket entitlement but more as an ancillary mopping-up exercise. With that final point defeated, the Council’s appropriation of the land was struck down.

C. CONCLUSION

“This is, on any view, an anxious and difficult case.”²⁹ So begins the discussion of the merits in the Inner House. That statement is true for the residents of Portobello, facing as they are a postponed school and (apparently) a degree of community acrimony and confusion as to how to proceed.³⁰ It may also be true for Scottish common good law in general, layering more complexity on an area of the law that is already difficult to understand. Compliance with the law for appropriation and alienation short of a disposal now appears to be a rather perilous path. One possible by-product may be the emergence of an increased tendency to follow the clearer route for disposal of land (with suitable court sanction), thus eroding the reserves of inalienable common good land in the process?³¹

The indications from the Council are that no appeal to the Supreme Court will be forthcoming,³² which has the obvious benefit of focussing the community and the Council on a new way forward that does not imperil a common good asset. However, it does prevent further legal clarification coming from a higher level. Absent that clarification, there may well be a sound case for legislation to close any lacunae that *Portobello* has identified³³ and to set out a comprehensive framework for common good assets in Scotland. The saga may also be a catalyst for further study in the area, identified as desirable in a recent volume of this journal,³³ whilst also providing another salient warning for legal advisers to ensure that no party to a

26 Ferguson (n 17) at 237. Andy Wightman also considers this point for the (now completed) Holy Cross School in Hamilton. See his blog post “The illegal high school”, 18 September 2012, available at <http://www.andywightman.com/?p=1616>.

27 McFadden, *Local Government Law* (n 14) at para 4.9.

28 *Portobello* at para 42.

29 Para 23.

30 See, for instance, “Labour politicians withdraw report on high school talks”, *The Scotsman* 13 Oct 2012.

31 See Agendas, Reports and Minutes of the Council, Item 8.1 (n 6) at 3.1.5.

32 See “Portobello High School: council bids to change law”, *BBC News Online* 19 Oct 2012.

33 See G L Gretton (2011) 15 *EdinLR* 329 at 330 (reviewing A Wightman, *The Poor Had No Lawyers* (n 4)).

transaction is acting *ultra vires*. Some residents of Edinburgh may be happy with the outcome of the *Portobello* story, others will only be happy when Portobello gets a new school.

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(The author would like to thank Andy Wightman for sharing the fruits of his characteristically resourceful fieldwork.)

EdinLR Vol 17 pp 68-71

McSorley v Drennan

Error cases are typically few and far between and they are often less than helpful in the quest for a coherent understanding of the doctrine. Recently the Outer House decision in *Parvaiz v Thresher Wines Acquisitions Ltd*¹ provoked a rather critical response for commending counsel's hesitance to address the issue of error fully.² In the recent case of *McSorley v Drennan*³ it seems that it is the judiciary who are having some difficulty.

McSorley is the latest in a well-known line of cases which deal with one party taking advantage of the error of another, starting with *Steuart's Trustees v Hart*⁴ and ending most recently with *Angus v Bryden*.⁵ While *McSorley* is undoubtedly of interest, it unfortunately raises more questions than it answers. Nonetheless, it is at least a forward step in the quest for doctrinal coherence in cases of error.

A. THE FACTS

The facts of the case can be relatively simply stated, but make for painful reading. The parties concluded missives for the sale of a cottage and garden. However, on the plan annexed to the missives both the garden and an additional area of land nearby which was also owned by the pursuer were tinted pink. The risk arising from the plan was identified in early course, but was resolved in correspondence between the parties' solicitors confirming that the additional plot was not included in the sale. Despite this correspondence, the solicitor for the defenders (Mr and Mrs Drennan) drafted a disposition purporting to dispose the entire area tinted pink on the plan without further modifications. The inaccurate disposition then came to be executed, delivered and recorded in the Land Register.

1 [2008] CSOH 160.

2 M Hogg, "The continuing confused saga of contract and error" (2009) 13 EdinLR 286.

3 [2012] CSIH 59.

4 (1875) 3 R 192.

5 1992 SLT 884.

A few months later, the pursuer's solicitor apparently noticed the error and wrote to the Drenmans' solicitors. However, no reply was received and the matter was seemingly never followed up. In fact, it was nearly a year later before the pursuer and his solicitor discovered that the property, including the additional area, had been sold on by the defender to a third party who maintained that the additional plot was now his.⁶

The pursuer reasoned that, since a third party had come to hold the property in good faith, it was impossible to seek reduction and rectification of the Land Register.⁷ He therefore brought an action for damages against Mr and Mrs Drennan in the Sheriff Court on the basis that the defenders had known and taken advantage of his error.

Despite denials on the record that the defenders had been aware of any error prior to the sale to the third party, the Sheriff ordered that the matter proceed to proof of *quantum* only. He reasoned that the defenders (i) "must have been aware that the additional plot had come to be included in their title"; and (ii) that "they must deliberately have sold it on to the third party".⁸ The Sheriff's decision was upheld on appeal to the temporary Sheriff Principal.

The Inner House quickly disposed of the action, observing that the Sheriff and temporary Sheriff Principal had gone "much too far".⁹ In the first place, the pursuer's claim necessarily failed on its merits. Lord Emslie, delivering the opinion of the court, considered that the Sheriff and Sheriff Principal "effectively upheld [the pursuer's case] without admission or proof".¹⁰ In Lord Emslie's opinion, the evidence instead suggested that all parties remained "unaware that the disposition had in error carried the additional plot to the defenders".¹¹

B. DAMAGES AND SNATCHING AT A BARGAIN

As a result of the factual situation, *McSorley* does not conclusively settle the question of whether an action based on taking advantage of an error could theoretically sustain a plea for damages. At first instance the Sheriff considered that,

... an unintentional error being an error of expression by one party to a contract known to and taken advantage of by the other party is a wrong for which our law provides a remedy...¹²

He concluded that where, for whatever reason, the remedy of reduction was discounted, the law would "put right" the "wrong" by awarding damages.¹³

6 *McSorley* at para 2.

7 Land Registration (Scotland) Act 1979 s 9.

8 *McSorley* at para 5.

9 Para 9.

10 Para 5.

11 Para 9.

12 See e.g. *Angus v Bryden* 1992 SLT 884 at 887.

13 *McSorley* at para 5.

On appeal, the temporary Sheriff Principal agreed that while the pursuer “did not found on the breach of any contractual term, there was no reason in principle why a relevant case for damages might not be made if the loss arose ‘in the broadest sense’ out of the contract”.¹⁴

In the subsequent appeal against the decision of the temporary Sheriff Principal, the Drennans argued that the pursuer’s averments did not disclose a relevant case, having factually failed to disclose a breach of obligation. In particular, it was suggested that:¹⁵

If, as the pursuer maintained, the parties’ common error had resulted in a non-contractual benefit being unintentionally conferred on the defenders, then his remedy was to pursue either (a) reduction of the offending titles, or (b) a claim in unjustified enrichment, or possibly (c) a claim based on delict. What he could not do, especially in the absence of supporting authority, was promote a claim of damages on the vague and inspecific [sic] basis which had found favour in the court below.

The Inner House considered that the pursuer’s claim failed as a matter of relevancy. Lord Emslie considered that it was “well settled that the private law remedy of damages is only available where one party sustains loss through another’s breach of some contractual or delictual obligation”.¹⁶ In the present case, the pursuer’s vague allegations of knowledge were insufficient to constitute the “specific and pointed averments” of “deliberate and dishonest wrongdoing”¹⁷ which would be required in order to meet the test of relevancy.

However, the Inner House did not expressly rule out, as a matter of principle, that damages might be available for knowingly taking advantage of the error of another party. Instead, the present case was distinguished from cases such as *Stewart’s Trustees v Hart* and *Angus v Bryden* on the basis that: (i) there was no authority for the proposition that a person must be constructively held to have knowledge of the technical details of dispositions; and (ii) the relevant authorities concerned “pre-contractual dealings and the ‘snatching of a bargain’ by unfair means”.¹⁸ *Ex hypothesi*, had the pursuer been able to demonstrate actual knowledge by the defenders of the error under which he was acting prior to delivery of the disposition, damages may well have been available.

If the above is correct, further consideration should be given to what might constitute “deliberate and dishonest wrongdoing” in the context of error known to and taken advantage of by the defender, and whether this test differs from what is required in the case of reduction. The Sheriff Principal took the view that mere knowledge of the error was sufficient to put the defender in bad faith. In truth, it does not seem possible to take advantage of an error “innocently” where there is knowledge

¹⁴ Para 6.

¹⁵ Para 7.

¹⁶ Para 9. See also F Davidson, “Substitutionary redress (damages)” in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 15 (1996) paras 891-892.

¹⁷ Para 10.

¹⁸ Para 9.

that the other party is acting under it. However, whether the test for error known to and taken advantage of differs depending on the context of the remedy sought remains to be seen. At least it seems clear from *McSorley* that the Courts acknowledge that the point at which knowledge of the error arises (either pre-contractually or after execution) is a relevant consideration.

C. CONCLUSION

McSorley is interesting insofar as it suggests taking advantage of an error may constitute a delictual wrong for which damages may be available. However, the factual situation did not permit the Court to answer some of the more difficult issues. It at least seems clear that the law perceives a difference between knowingly concluding a contract in the face of an error and discovering that error at a later stage. In the latter situation, a remedy along the lines of *Rodger (Builders) Ltd v Fawdry*¹⁹ and *Gibson v Royal Bank of Scotland*²⁰ may be the more appropriate course of action where damages are sought.²¹

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EdinLR Vol 17 pp 71-78

“100 per cent, Body and Soul”: The Ability of an Agent to Act for a Competitor of his Principal

In a case decided in 2009, Lord Justice Jacob memorably described the fiduciary duties of an agent as follows:¹

The law imposes on agents high standards... An agent's own personal interests come entirely second to the interest of his client. If you undertake to act for a man you must act 100%, body and soul, for him. You must act as if you were him. You must not allow your own interest to get in the way without telling him. An undisclosed but realistic possibility of a conflict of interest is a breach of your duty of good faith to your client.

Whilst there are many such judicial statements describing in general terms the agent's fiduciary duties, it can be more difficult to identify what those duties require of an agent on the facts of a particular case. Does a rule against conflicts of interest entirely prevent an agent from acting for a competitor of his principal? This and other

¹⁹ 1950 SC 483.

²⁰ [2009] CSOH 14: incidentally, another of Lord Emslie's decisions.

²¹ *McSorley* at para 3.

¹ *Imageview Management Ltd v Kelvin Jack* [2009] EWCA Civ 63 at para 6.

important questions were recently considered by the Court of Appeal in *Rossetti Marketing Ltd and Anor v Diamond Sofa Company Ltd*.²

This case was an appeal from a decision of Cranston J which determined certain preliminary issues. As such, the judgment does not contain a full analysis of all the legal issues. The Master of the Rolls, Lord Neuberger, delivered the main judgment in the Court of Appeal with which Lord Justices Moses and Rimer agreed.

A. THE FACTS

Diamond is a company whose operation is based in Thailand, where it manufactures leather upholstery. Diamond entered into an agreement with SML, a company set up to represent Asian furniture manufacturers and to assist them in penetrating the UK market.

In February 2004, Diamond and SML orally agreed that SML would act as Diamond's exclusive agent in connection with the sale of leather upholstery in the UK and Irish markets. During negotiations SML informed Diamond that it was already acting for two other manufacturers of upholstery, namely Linkwise and ArtPeak, but gave assurances that the furniture range of each of those two companies did not clash with that of Diamond. The agency agreement was entered into for one year initially and was subsequently continued beyond the initial duration because SML proved to be "remarkably successful" at acting on Diamond's behalf.³

In 2008 a new company, RML, replaced SML as agent acting for Diamond. This arrangement was initiated by SML who wanted to transfer all of its principals to a new company with effectively the same ownership and directors as SML.⁴ Shortly thereafter, however, the relationship between the parties began to break down. Citing a number of breaches on the part of RML, including investing insufficient effort to improve Diamond's market share and representing two of Diamond's competitors (two separate manufacturers known as Cassaredo and Creative), Diamond terminated the agency agreement on 4 June 2008. Given that RML fell within the definition of a commercial agent in terms of the Commercial Agents (Council Directive) Regulations 1993,⁵ RML responded by bringing a claim for compensation due under Regulation 17.

B. DECISION OF THE HIGH COURT (QUEEN'S BENCH)

When the dispute came before the High Court, the debate focussed on the impact that acting for more than one principal had on the commercial agent's ability to bring a claim for compensation under the Regulations. Diamond indicated that it had

² [2012] EWCA Civ 1021.

³ Lord Neuberger quoting (at para 5) from Cranston J's judgment at [2011] EWHC 2482 (QB) para 20.

⁴ This change was motivated by the fear of litigation. SML was potentially liable for injuries to consumers of Linkwise furniture caused by the way in which the leather was treated. The change of identity ensured that future commissions would not be at risk from an adverse court judgment in the personal injury cases given that liability for such injuries remained with SML: see *Rossetti* at para 49.

⁵ Reg 2(1), SI 1993/3053.

terminated the agreement because RML had acted for two of its direct competitors. Cranston J held that there was no express term which covered the ability of SML or RML to act for competing principals but that there was an implied term at the outset of the contract which, in effect, permitted SML to continue to act for both Linkwise and ArtPeak. This implied term was, he decided, varied by a course of dealing between the parties, in particular because Diamond knew that SML had assumed agencies for Cassaredo and Creative and had not objected to this course of action. However, he held that nothing in the course of dealing gave rise to an implied term which would have enabled SML or RML to place orders with other principals at the expense of Diamond.

C. DECISION OF THE COURT OF APPEAL

(1) Fiduciary duties in general

Lord Neuberger began his analysis with an explanation of the agent's fiduciary duties. Quoting Millett LJ in *Bristol and West v Mothew*⁶ he referred to the "single-minded duty of loyalty"⁷ that an agent owes to a principal: he "... must not place himself in a position where his duty and his interest conflict", and he "may not act for... the benefit of a third party without the informed consent of his principal." He referred also to *Kelly v Cooper*⁸ in which Lord Browne-Wilkinson had said that "it is normally said that it is a breach of an agent's duty to act for competing principals." Such fiduciary duties do not, however, exist in isolation from the terms of the agency contract. Lord Neuberger was referred to the Canadian case of *Hospital Products Ltd v United States Surgical Corporation* in which Mason J stated that where a fiduciary duty arises out of a commercial contractual arrangement, that duty "if it exists at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them."⁹

(2) Agent acting for a competitor of his principal

What is slightly confusing about the case is the interaction of the common law and the Commercial Agents Regulations on the issue of acting for a competitor. The agent's fiduciary duties have their basis in the common law. The Commercial Agents Regulations additionally require those agents falling within their ambit to "act dutifully and in good faith."¹⁰ According to the authors of the leading textbook on the Regulations, the "... duties of a commercial agent set out in that Regulation [3] essentially mirror the fiduciary duties imposed on agents by English law."¹¹ It appears to have been assumed at both stages of *Rossetti* that this is the correct

6 [1998] Ch 1 at 18A-B.

7 *Rossetti* at para 20.

8 [1993] AC 205 at 214D.

9 (1984) 156 CLR 41 at 97.

10 Reg 3(1).

11 F Randolph and J Davey, *The European Law of Commercial Agency*, 3rd edn (2010) 55. In a case note on the High Court decision Wood states: "In the practitioner community, the meaning of 'acting

approach. But is that necessarily the case?¹² Given that the Regulations implement a European Directive, courts in the UK may have to give to “good faith” a “European” rather than a “British” meaning. At the very least, the court should look for decisions from other parts of the European Union in which the phrase has been interpreted in a commercial agency context. Only in this way will the harmonisation that the Directive sought to achieve be obtained. This is, however, an issue for another day.

Lord Neuberger identified two types of case in which an agent is entitled to act for a competitor.¹³ The first is where both principals agree. In such a case the agent must show that the original principal not merely consented, but that the consent was given on a fully informed basis.¹⁴ The second type of case is where the original principal must have appreciated that the nature of the agent’s business was to act for numerous principals. The most obvious example of this type is the estate agent, given that it is inherent in the nature of the business of such an agent that he act for a number of principals at the same time.

According to Lord Neuberger, on the facts of this case there was no reason to conclude that the normal non-compete rule did not apply.¹⁵ Diamond had not agreed that SML could act for competitors. Diamond had been told by SML that although SML acted for Linkwise and ArtPeak the products SML was marketing for those companies would not be similar in nature to those SML was marketing for Diamond. There would be no clash of products. This supported the conclusion that Diamond would not have expected SML to act for competitors and had certainly not agreed to this. An attempt to place SML/RML within the same class as residential estate agents was unsuccessful,¹⁶ Lord Neuberger referring to the conclusion of the leading English textbook on agency that “estate agents are only imperfectly agents and are known to act for many principals.”¹⁷

Nor did SML/RML acquire the right to act for competitors after 2004. Oral evidence established that Diamond was aware that RML was acting for Casserado and Creative. However, Diamond was led to believe that those companies’ products did not clash with their own. Whilst there was informed consent to RML acting for Creative and Casserado in relation to non-clashing products, there was no informed consent in relation to clashing products.

dutifully and in good faith” has normally been considered (in English common law terms) as equating to acting in accordance with a fiduciary duty,” see A Wood, “*Rossetti Marketing Ltd v Diamond Sofa Co Ltd*: commercial agency – a tale of the tail not wagging the dog” (2011) Cov LJ 67 at 70.

12 This view has already been challenged by the current author in her review of Randolph and Davey’s book (n 11): see L Macgregor (2011) 6 JBL 643 at 645.

13 *Rossetti* at paras 22 and 23.

14 Quoting Tuckey LJ in *Hurstanger Ltd v Wilson* [2007] EWCA Civ 299, [2007] 1 WLR 2351 at para 35, which approved a passage from P Watts and F M B Reynolds, *Bowstead and Reynolds on Agency*, 19th edn (2010), para 6-039.

15 *Rossetti* at para 24.

16 Para 27.

17 *Bowstead and Reynolds on Agency* (n 14), para 6-945 n 294.

Lord Neuberger's inescapable conclusion is worth quoting:¹⁸

... the sensible and proper course for SML to have taken if it wished to act for a manufacturer of furniture which competed with that made by Diamond, was to inform Mr Charoenyos, [the managing director of Diamond] and to obtain his consent. By not taking that course, SML, and then RML, took the risk that, when it appreciated what had occurred, Diamond would stand on its strict legal rights, and that is what has happened.

(3) Lessons for Scots law?

How relevant is this decision for Scots law? The issue was considered in *Lothian v Jenolite*¹⁹ in which an agent was appointed on a non-exclusive basis and the legal question was whether there was, in every contract of agency, an implied condition that the agent would not compete with his principal, even when acting outside the sphere of his contract with his principal. Finding that this was not the case, the court indicated that only an express term could have achieved this result. However, the judgments in *Lothian* focus on the nature of the implied condition which the principal argued had applied, noting that its effect would have been to prevent the agent from exercising his freedom of trade outside his agency or, in the words of Lord Milligan, "in an outside matter."²⁰ Unsurprisingly, the principal failed to convince the court that a condition of such a "sweeping"²¹ nature applied. Lord Milligan stated:²²

The proposition which the defenders invite us to affirm is that in all agency cases there is an implied condition that the agent will not without the permission of his principal act, even in an outside matter, in such a way as to bring his interests into conflict with those of his principal. There is admittedly no case in which such a proposition has been affirmed, and the proposition is a sweeping one which, if it is sound, would undoubtedly affect a very large number of cases where an agents acts for two or more principals. There would normally be no objection to such a condition or term being expressly included in a contract of agency... but it is a different matter to imply such a condition when it does not appear expressly in the contract. It is, moreover, more difficult to imply a condition in a written contract than a verbal contract... The introduction of the condition would... make the contract a different contract altogether, and moreover it was a condition to which the parties could readily have given expression if that was their intention... The many authorities quoted by the defenders establish that, while actually performing his principal's business, an agent is not entitled to take advantage of his position and make a profit for himself, but, as I have said, no authority was quoted for the much wider proposition for which the defenders now contend.

18 Para 48.

19 1969 SC 111.

20 At 122.

21 At 120.

22 At 117.

The utility of *Lothian* as a precedent is limited. The pursuers framed their claim too broadly. Clearly, an agent is not completely prohibited from acting for a competitor of the principal in every case and there is no implied term to that effect. Lord Milligan twice referred to the phrase “even in an outside matter”; in other words, the pursuer’s contention, if correct, would have prevented an agent from acting for a different principal even where the agent was selling goods which did not compete with those of his original principal. That, of course, was not correct either. Lord Milligan clearly sought to keep to a minimum any constraint on the agent’s freedom to trade.

The issue in *Rossetti* is a narrower and more fundamental one, namely the ability of an exclusive agent to act for a competitor of his principal in the sale of products which compete with his principal’s products. This directly engages the agent’s fiduciary duties: the agent is, of course, required to place the interests of his principal above his own. Selling for another principal products which compete with the original principal’s products conflicts with the agent’s duty.

In a future Scottish case, *Rossetti* is likely to be useful where the sale of directly competing products has occurred. In *Rossetti* the agent was appointed exclusive agent in connection with the sale of leather upholstery in the UK and Irish Markets. By contrast, in *Lothian* the agent was engaged by the principal neither on a full-time nor an exclusive basis. Where the agent is, in effect, the only outlet for the principal’s goods in a particular geographical area, a principal can reasonably require more strict observance of his agent’s fiduciary duties than would be the case if the agent had been appointed on a non-exclusive basis.

(4) “Transfer” of an agency under the Commercial Agents (Council Directive) Regulations 1993

Another interesting issue was the impact of the “transfer” from SML to RML on RML’s claim for compensation under the Commercial Agents Regulations. Lord Neuberger concluded that the transfer probably amounted to novation rather than assignment.²³ After all, both the rights and the obligations of the agency contract were “transferred” from SML to RML. He concluded, therefore, that SML’s agency came to an end and was replaced by a new agency to RML which rested on the same terms as the original agency.²⁴ This is an important point given that it has an impact on the overall duration of the agency relationship. Under Regulation 15 the periods of notice differ depending on the duration of the agency agreement. If one looked only at the SML contract, only one month’s notice of termination was due. If the relevant duration was that of the SML and the RML contracts, three months notice would have been due.²⁵

The length of the agency agreement is also relevant to calculation of compensation under Regulation 17. In *King v Tunnock*²⁶ Lord Caplan, delivering the opinion of an

²³ Para 50.

²⁴ Ibid.

²⁵ Para 53.

²⁶ 2000 SC 424.

Extra Division of the Inner House, emphasised not only the duration of Mr King's agency, but also the fact that his father had held the agency before him. These facts combined to render Mr King's case a serious one, and possibly explains why he was awarded such a high amount of compensation.²⁷

Lord Neuberger concluded²⁸ from the terms of Regulation 18(c) that where a principal agrees to instruct a new agent in place of an existing agent, in circumstances where the existing agent has transferred the agency business to the new agent, the new agent is to be treated as having taken an assignment of the existing agent's rights and duties. His conclusion on this point is important. The English language version of Regulation 18(c) uses the word "assigns." Lord Neuberger did not, in this case, give that word its normal English legal meaning, which would have had the effect of limiting it to cases of true assignation in English law. Rather, he gave it a purposive interpretation, noting:²⁹

... the fact that the common law might treat the new agency as a new contract is neither here nor there. This conclusion appears to me to comply with the commercial purpose of the Regulations.

Given that this case sought only to determine preliminary issues, there is no analysis of the amount of compensation RML was due under Regulation 17.

D. CONCLUSIONS

This English case could be a very useful precedent in Scots law. It helps to flesh out the meaning of the agent's fiduciary duty and specifically what that means when it comes to acting for a competitor of the principal. Clearly, decisions cannot be made without a careful analysis of the facts including the nature of the potential breach and the agreed parameters of the agent's ability to act for other parties. The case also illustrates the need for the courts to adopt a non-technical, purposive approach to the interpretation of the Commercial Agents Regulations. In *Rossetti* the Court of Appeal gave to the word "assigns" a commercially practical rather than a strict legal meaning. In so doing, the Court ensured that the significant protections offered by the Regulations were not removed from that agent. What the case does not

²⁷ Mr King was awarded the equivalent of two years' gross commission. The Extra Division's approach in *King v Tunnock* has been criticised in several later English cases, for example, *Barrett McKenzie v Escada (UK) Ltd* [2001] ECC 450; *Tigana Ltd v Decoro Ltd* [2003] EWHC 23 (QB), [2003] ECC 23, culminating in Lord Hoffmann's criticism in *Lonsdale v Howard & Hallam Ltd* [2007] UKHL 32, [2007] 1 WLR 2055. In the aftermath of *Lonsdale*, *King* may be an unsafe authority as regards the Extra Division's failure to look into the future and take into account the failing nature of the principal's business in the exercise of calculation of compensation. In other respects *King* remains authoritative, for example the Extra Division's emphasis of the role of goodwill in the calculation exercise. It is suggested that the length of the agency remains relevant to calculation of compensation. On the status of *Lonsdale* as an authority in Scots law see L Macgregor, "Compensation for commercial agents: an end to plucking figures from the air?" (2008) 13 EdinLR 86.

²⁸ Para 55.

²⁹ Para 55.

do is shed light on the meaning of “good faith” as it is used in the Directive and Regulations, and whether that phrase simply mirrors the agent’s fiduciary duty in English and Scots law. That is, unfortunately, an issue which remains subject to doubt.

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EdinLR Vol 17 pp 78-83

Ferrexpo AG v Gilson Investments Ltd and ors: A Flexible Interpretation of the Reflexive Doctrine

A. INTRODUCTION

A decision explicitly analysing, indeed relying upon, the doctrine of *effet réflexe*, such as that handed down by the Commercial Court of the Queen’s Bench Division in *Ferrexpo AG v Gilson Investments Limited and ors*,¹ is worthy of note.

The concept and status of *effet réflexe* are matters of debate. Arguments under this doctrine arise in common law courts, particularly in England and Ireland, when *ex facie* it appears that such a court is seised with litigation on a Brussels I Regulation² ground of jurisdiction, but there are non-EU elements in the factual matrix, rendering the case categorisable as “hybrid”, and arguably justifying the common law forum putatively seised in declining to exercise that “Brussels” jurisdiction.

The best *entrée* to the subject of *effet réflexe* is to posit the situation of litigation arising in an EU member state on some apparently available ground of jurisdiction, such as the defendant’s domicile under Article 2 of the Regulation, in circumstances where the matter concerns rights *in rem* in land situated in a non-EU country (“Third State”). Were such circumstances to present wholly within the geographical confines of the EU, the EU court first seised would be required to defer to the EU member state court of the *situs*,³ provided that the court first seised considered the issue to fall under Article 22.1. Under *effet réflexe* it is argued that, in the hybrid situation described, the EU court first seised may cede the case to the Third State court on the basis that the intra-EU rules of jurisdiction should be “extended” so as to apply outside their strict geographical bounds. By this theory, an EU court is entitled to defer to a Third State court if circumstances exist in which, *mutatis mutandis*, it would be required under the regime to defer to a fellow EU member state court. The “reflexive” descriptor denotes that the Brussels regime and its rules are being reflected outwards to address a mixed situation which is far from being a paradigm Brussels case.

1 [2012] EWHC 721 (Comm).

2 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“the Regulation”).

3 Art 25 of the Regulation.

If the EU forum were to yield to the Third State court, the exclusive jurisdiction principle enshrined in Article 22 of the Regulation can be said to have been honoured, thereby extending perforce the ambit of the Brussels regime both geographically and in policy terms. Yet it is evident also that the EU member state court has lost the business of the litigation and an outside court has gained it: a potential “EU” case has slipped the leash. This aspect is the one which (paradoxically) most gratifies the common law jurisdiction. Controversy arises essentially because the theory can be used to justify the (English) forum, as it sees it, in declining a jurisdiction with which, on the face of the Regulation, it is properly endowed and arguably ought to exercise; and even to warrant, in the forum’s view, application of national rules in substitution. In this way, the rules of the Brussels regime may be used to evade the regime, a Machiavellian subversion.

Such authority as exists in support of reflexive effect is fragmentary, and perhaps is best monitored by category. The opportunities for an (English) court to operate in this way arise in circumstances concerning notional application of Articles 22 (exclusive jurisdiction), 23 (choice of court), 27 and 28 (*lis pendens*). The strongest argument for application of *effet réflexe* is in relation to Third State proceedings where jurisdiction is taken on grounds comparable to those covered by Article 22, and a fairly strong case may be made in favour of upholding an exclusive choice of court clause for a Third State.⁴ Greater doubt attends the strength of the reflexive argument in the operation of the *lis pendens* rules.⁵

The authorities in which such arguments have been ventilated are few and sometimes inconclusive, and so the analysis and musings of Smith J in *Ferrexpo* is valuable from a professional and academic perspective.

B. THE FACTS

The case, which has an intriguing political and personal sub-plot involving rival oligarchies, concerns the possible reflexive effect not of the more familiar Article 22.1, but principally of Articles 22.2⁶ and 22.3.⁷

In October 2011 Gilson Investments Ltd, an English company (“G”), commenced an action in Ukraine against a Ukrainian mining company, Open Joint Stock Company (“O”), concerning G’s ownership of shares in O. G sought to restore its shareholding interest alleging invalidity of resolutions passed at shareholder meetings.

The Ukrainian proceedings were adjourned until 23 November 2011, at which point Ferrexpo AG, a Swiss company (“F”) which claimed to own over 98% of the

4 *Konkola Copper Mines Plc v Coromin Ltd* [2006] EWHC 1093.

5 See e.g. the decision of the Irish Supreme Court in *Goshawk Dedicated Ltd v Life Receivables Ireland Ltd* [2009] IESC 7.

6 Re proceedings having as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons, or of the validity of the decisions of their organs: the courts of the Member State in which the company etc has its seat shall have exclusive jurisdiction. *Choudhary v Bhatler* [2009] EWCA 314 (Ch) is a rare, and criticised, decision on the interpretation of Art 22.2.

7 Re proceedings having as their object the validity of entries in public registers: the courts of the Member State in which the register is kept shall have exclusive jurisdiction.

shares in O, was formally joined as respondent by order of the Ukrainian judge. On 22 November, however, proceedings were issued by Ferrexpo against G in England, on the basis of G's English residence. F, concerned about unfair treatment if the litigation were to be heard in Ukraine, hoped to obtain in England appropriate declaratory relief regarding its ownership of shares in O. Challenging the jurisdiction of the English court, G applied for a declaration either that the English court had no jurisdiction to try the claim and should dismiss it, or that the English court should not exercise any jurisdiction that it might have over G and should stay the proceedings.

C. THEORIES OF REFLEXIVE EFFECT

Smith J, noting that "reflexive application" does not have a precise meaning, usefully summarises its effect:⁸

... in some circumstances the court may decline jurisdiction or stay proceedings in favour of the jurisdiction of a non-member state, and... *Owusu* does not (or does not always) preclude the court from doing so.

His Lordship outlines three versions of the theory, the most rigid being that in hybrid situations the forum *must* apply by analogy the rules of the Regulation, as though non-member states were member states. To be true to this theory, the EU forum seised has the *duty* to dismiss (on the basis of no jurisdiction and, in relation to Article 22, on the dictat of Article 25), not the privilege of pondering whether or not to stay the action (which would presuppose that the forum *has* jurisdiction). By contrast, the most flexible theory gives the forum discretion whether or not to accept jurisdiction where the issue, in a wholly EU framework, would be covered by Articles 22, 23, 27 or 28. Thirdly, as a bold variant, the forum may be justified in exercising powers available under its residual national rules in cases where, had there been a similar connection with a member state, the court would have had to decline jurisdiction.

The hybrid situation presents, possibly quite frequently, a real problem. The reflexive theory in its strictest sense is a defensible solution. The suspicion arises that should the argument proceed, by dint of the more flexible theories, to the point where the (English) forum persuades itself that, having jurisdiction, it is entitled to use its discretion to stay or not (in a manner of reasoning akin to that deployed in *forum non conveniens* jurisprudence⁹), that court is having a field day.

D. THE ARGUMENTS ON JURISDICTION

F argued that the English court, being seised under Article 2 of the Regulation, had no discretion to divest itself of jurisdiction following the decision of the CJEU in *Owusu v Jackson*.¹⁰

⁸ *Ferrexpo* at para 125, citing *Owusu v Jackson* (C-281/02) [2005] ECR I-1383, [2005] QB 801.

⁹ It is worthy of note that Smith J devotes paras 33-96 of his judgment to addressing evidence as to corruption and delay allegedly affecting the Ukrainian court and legal system, *prior* to taking a view on the subtleties of the reflexive effect argument.

¹⁰ [2005] ECR I-1383, [2005] QB 801.

In response G argued that, notwithstanding *Owusu*, the court has power to decline its Article 2 jurisdiction and the duty to do so or, alternatively, that the court should stay its proceedings on the principal bases that, first, while Ukraine is not an EU member state, the forum should give reflexive application to Article 22; and, secondly, Article 28 should be given reflexive application and, in view of the earlier “related” Ukrainian proceedings, it should decline jurisdiction.

E. THE DECISION

(1) Reflexive applications of Article 22

Dealing first with Article 22, Smith J addresses the question whether, if Ukraine had been a member state, the Ukrainian courts would have had exclusive jurisdiction under Article 22.2 or 22.3. An examination was required of the “real nature”¹¹ of the dispute to ascertain if it fell within Article 22, a scrutiny more profound than merely examining the particulars of claim or the form of relief sought. After careful analysis, Smith J accepted G’s submission that the English proceedings “have as their object the validity of the resolutions of [O’s] general meetings, an organ of a company whose seat is Ukraine.”¹² Reliance therefore did not need to be placed on whether the proceedings had as their object the validity of entries on public registers in Ukraine, to satisfy Article 22.3.

Thus far, the judgment, in showing itself open to reflexive effect arguments, is an interesting addition to the debate, coming down in favour of the concept. However, having admitted the concept in principle and having satisfied himself that, on the facts, the case properly fell under Article 22.2, Smith J sets down a more controversial finding—having received only brief submissions on the point—that reflexive application of Article 22 is not mandatory, but discretionary. In his view, there is no reason to follow the doctrine “slavishly”.¹³ To apply the reflexive doctrine inflexibly might require an EU forum to send the case to a legal system where the parties would not receive justice. Furthermore, English jurisdiction procedure would resolve a case such as this by granting a stay under the Civil Procedure Rules¹⁴ or under the rules of its inherent jurisdiction, both of which are characterised by judicial discretion. The second of the judge’s reasons amply demonstrates the subtle difficulty and ambiguous nature of the hybrid case and reveals a flaw in the apparently even-handed reflexive reasoning. Reflexive reasoning in a hybrid case cannot work in *exactly* the same manner as orthodox reasoning in a purely EU case because in the latter the principles of mutual trust and comity operate between and among member states so as to quell any hint of inter-state criticism of forensic standards, substantive or procedural.¹⁵ The mutual trust and comity which is the fulcrum of the Brussels system is not universally found vis-a-vis Third States, a state of affairs which precludes a perfect reflection of the rules.

11 *Ferrexpo* at para 147.

12 Para 150.

13 Para 154.

14 CPR para 3.1(2)(f).

15 See in a non-Brussels context *Ceskoslovenska Obchodni Banka AS v Nomura International Plc* [2003] ILPr 20.

Throughout the discussions of this subject, and in the judgments, there is often a whiff of disingenuousness. Given the absence of parity between the EU and the hybrid scenarios, perhaps one ought to pursue the thought to the next stage, namely, judgment enforcement. If, by reflexive effect, a corrupt non-EU state is seised of a case and hands down a judgment, that judgment presumably would be denied recognition and enforcement in the UK,¹⁶ whether under Brussels or non-Brussels decree enforcement rules (which would be another debate), on public policy grounds. An unjust result would be avoided at the ultimate point.

While the result that the instant case should be heard in Ukraine commends itself for a variety of reasons, the judge's apparently rapidly formed view that the reflexive doctrine should be exercised flexibly, having regard to the circumstances of the individual case, evinces a glad return to the exercise of the natural instincts of the common law judge and exhibits a discretion of which the CJEU may not approve.

The *Ferrexpo* judgment displays double flexibility: (i) in admitting the doctrine of *effet réflexe*; and (ii) in arrogating to the forum the *discretion* to apply it in any given case. This result shows how deeply *Owusu* cut into the UK legal psyche and the adroitness of response of which common lawyers are capable.

(2) Reflexive applications of Articles 27 and 28

In *Catalyst Investment Group Ltd v Lewinsohn*¹⁷ Barling J in the English High Court decided against the propriety of application of the reflexive effect doctrine in a *lis pendens* case. Judge Theis, on the other hand, declined to follow *Owusu* in *JKN v JCN*,¹⁸ a matrimonial case of conflicting concurrent divorce proceedings, and deferred to the later seised New York divorce court as the more appropriate forum, having regard to the principles laid down in the Domicile and Matrimonial Proceedings Act 1973, *sub nom* “discretionary stays”.¹⁹ Judge Theis's decision proceeded partly on the dubious view that the principle of application of “commercial” Brussels jurisdiction rules set out in the Regulation do not transmit to “family law” jurisdiction rules set out in Brussels II *bis*. In declining jurisdiction, Judge Theis could not be said to be applying the *lis pendens* rules reflexively because (a) on the facts of dates of process they did not apply, and (b) she did not believe that Brussels I Regulation jurisprudence applied to cases falling under Brussels II *bis*. However that may be, it is clear that her judgment distanced itself from *Owusu* and showed itself in favour of the exercise of judicial discretion in the allocation of matrimonial jurisdiction on the basis of forum-determined views of appropriateness.

The decision in *JKN v JCN* is a frail foundation on which to build a case in favour of the competence of the operation of the doctrine in relation to Articles 27 and/or 28. However, Smith J takes succour from it and proceeds to assess whether or not – on

16 See *Merchant International Co Ltd v Natsionalna Aktsionerna Kompaniya Naftogaz Ukrainy* [2012] EWCA Civ 196.

17 [2009] EWHC 1964 (Ch).

18 [2010] EWHC 843 (Fam).

19 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 9.

the facts – the *Ferrexpo* litigation falls within Article 27, failing which Article 28; and, necessarily, whether the English or Ukrainian court was first seised.

While Smith J concludes that Article 27 (not Article 28) covers the case, and logically favours reflexive reasoning in relation to both articles, ultimately he accepts that the English court was seised first of the relevant proceedings with the relevant parties thus rendering any further discussion of the reflexive effect of Article 27 unnecessary. But Smith J, unlike the CJEU, was not shy of giving an opinion “for completeness” on the hypothetical question of how he would have exercised his discretion had Article 28 applied, and reflexively so. Confusingly, this discretionary grant of a stay within the Brussels scenario or partial Brussels scenario is not heinous or heretical, but rather is authorised by the very terms of Article 28 and, therefore, *ipso facto* is uncontroversial. Article 28 affords one example of patent forum discretion within the Brussels regime. For convincing reasons of the risk of mutually irreconcilable decisions, and because both litigations could be said to be at an early stage, Smith J would have exercised his discretion *per* Article 28 to stay the English proceedings in favour of those in Ukraine. While this “third level” of discretion is explicit in Article 28, Smith J did not express himself directly on the question whether or not reflexive interpretation of Articles 27 and 28 is mandatory, but the overall tone of the judgment favours discretion all the way.

F. BRUSSELS I BIS

The Brussels I Regulation is in process of being revised. In June 2012 the EU Council adopted a “general approach” on the recasting, with a modified draft text.²⁰ The draft text does not clarify the permitted or intended reflexive effect of the Regulation. Indeed the reflexive effect debate has been conducted largely within the UK, without reference having been made (assuming that would be competent – and that’s the rub) to the CJEU.

While the Commission Proposal to recast the Regulation²¹ sought to address the perceived problem of the raising of proceedings in an EU member state against a non-EU domiciled defendant, under the heading of “the operation of the Regulation in the international legal order”, the current text has drawn back from this challenge. Unless and until the recast instrument delivers a comprehensive set of rules to deal with hybrid situations, reflexive reasoning cannot be regarded as redundant. *Ferrexpo*, though a single judge decision, is a strong vote of support for the doctrine.

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²⁰ Interinstitutional file 2010/0383 (COD); 10609/12 ADD 1 (JUSTCIV 209; CODEC 1495). See, subsequently, European Parliament Committee on Legal Affairs Report on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) ((COM(2010)0748) – C7-0433/2010-2010/0383(COD)) (15.10.2012, Rapporteur - Tadeusz Zwiefka) (A7-0320/2012).

²¹ COM (2010) 748/final.

EdinLR Vol 17 pp 84-90

The Proposed Apologies Act for Scotland: Good Intentions With Unforeseeable Consequences

Apologies are very much in the news these days. David Cameron's recent public apology following the report of the Hillsborough Independent Panel appears to have been well judged;¹ others are less successful.² Margaret Mitchell's Apologies (Scotland) Bill Consultation suggests that Scotland would benefit from more of them.³ As Apologies Acts have spread through the Common Law world over the last twenty five years it is perhaps unsurprising that Scotland has finally got round to it,⁴ albeit via a Member's Bill.

The intention is "to provide legal certainty that an apology (as defined under the terms of the Bill) cannot be used as evidence in civil proceedings".⁵ This analysis considers some of the complexities inherent in such an endeavour, and whether it is likely to achieve its wider aims. While the subject has been little considered in Scotland,⁶ there is controversy internationally about the wisdom of legislating in this area.

A. THE APOLOGIES (SCOTLAND) BILL

The main premise of the consultation is that fear of litigation inhibits the Scots from apologising.⁷ This is bad for civil society because:

- (a) apologising is a normal, natural and socially useful way of putting things right; and
- (b) this very lack of apologies drives more people into litigation, at great expense.

An Apologies Act would make it clear that no-one will be penalised for apologising in certain circumstances. This protection would apply to both written and oral apologies,

1 See "Hillsborough papers: David Cameron 'profoundly sorry'", *BBC News Online* 12 Sep 2012.

2 See J Harrell, B L Ware and W A Linkugel, "Failure of apology in American politics: Nixon on Watergate" (1975) 42 *Speech Monographs* 245.

3 *Apologies (Scotland) Bill Consultation* (henceforth "Consultation"), available at http://www.scottish.parliament.uk/S4_MembersBills/20120708_Apologies_Consultation_corrected.pdf.

4 Massachusetts' Act dates from 1986, and Vines identifies 46 jurisdictions from the USA, Canada, Australia and the UK (England & Wales) which have now passed Apologies Acts. See P E Vines, "Apologies and civil liability in England, Wales and Scotland: the view from elsewhere" UNSW Law Research Paper No. 2007-61 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1366505.

5 Consultation at 2.

6 The one exception is written by a visiting Australian scholar: see Vines (n 4). A version of this paper has been published in this journal: see P Vines, "Apologies and civil liability in the UK: a view from elsewhere" (2008) 12 *EdinLR* 200.

7 Consultation at 11.

but not to admissions of fault or statements of fact.⁸ I consider below the nature of apologies and whether or not the Bill will deliver the sought-after benefits.

B. RISKS, BENEFITS AND UNINTENDED CONSEQUENCES OF APOLOGIES

As a practising mediator I can attest to the power of apologies delivered at the right moment and in the right manner. They can have both practical and emotional impact, sometimes unlocking longstanding conflict. There are, however, risks.

(1) The “partial apology”⁹

This is usually an expression of regret with no admission of fault or responsibility. Partial apologies can actually exacerbate the situation, tending to “fuel bitter vengeance rather than assuage the anger the gesture was strategically designed to alleviate”.¹⁰ Jack McConnell’s 2004 apology for the historic abuse of Scotland’s looked-after children has been described in these terms.¹¹

(2) The rejected apology

It can be devastating when a sincere and unreserved apology is not accepted by the recipient. This generally chills the climate for further resolution. While legislation can address the legal consequences of apologies it cannot compel their mirror image, forgiveness.

(3) Litigation

The premise of this and other Apologies Acts is that claimants regularly found on the making of an apology in evidence. This risk may have been exaggerated. Vines

8 Consultation at 18: “It is the intention that the proposed Bill should allow that where someone makes an admission of fault, in the context of an apology, it should still be possible to construe those statements as implying legal liability.”

9 P E Vines, “The power of apology: mercy, forgiveness or corrective justice in the civil liability arena” UNSW Faculty of Law Research Series (2007) Paper 30 at 5, available at <http://law.bepress.com/unswlwps/flrps/art30/>.

10 R Lazare, cited in L E Jesson and P B Knapp, “My lawyer told me to say I’m sorry: lawyers, doctors and medical apologies” (2009) 35 William Mitchell Law Review at 36 (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1417484), quoting L Taft, “Apology and medical mistake: opportunity or foil?” (2005) 14 Annals of Health Law 55 at 79, who in turn cites A Lazare, “Go ahead and say you’re sorry” 1995 Psychology Today Jan-Feb/40.

11 Mark Gould wrote in the *Guardian* on 8 Dec 2004: “McConnell’s statement was carefully worded to take into account this concern: he said sorry on behalf of ‘the people of Scotland,’ rather than ‘the Scottish executive’. The shrewd distinction was crafted to protect ministers from potential legal action by around 1,000 Scots who alleged that they suffered abuse in children’s homes, some as long ago as the 1940s.”

found little evidence for it, also pointing out that “an apology could not amount to an admission of liability in negligence because it is for the court to determine that”.¹²

So, while the legal risk of apologising may have been overplayed, the practical and ethical drawbacks of inept or rejected apologies seem not to have been considered. I now turn to the other side of the utilitarian equation: are apologies all they are cracked up to be?

On the face of it, yes. Apologies have been significant to those making complaints against health professionals,¹³ with one Canadian study finding that 88% of medical negligence plaintiffs sought an apology.¹⁴ However, an even higher percentage (94%) wanted an admission of fault. US evidence pointed to significant savings once a less defensive approach to medical negligence claims was adopted,¹⁵ but apologies were generally one element in a wider transformation of the previous “deny and defend” approach.¹⁶ There are lessons for Scotland. The health providers who saw the most tangible results took a proactive approach to adverse medical events, appointing dedicated staff, offering apologies where justified and “defend[ing] medically reasonable care vigorously”.¹⁷ An Apologies Act is likely to have limited impact if not accompanied by a similarly proactive approach to the failings of public bodies. More dishearteningly for this Bill, the most comprehensive study of Scottish people’s attitudes to legal problems found no evidence that apologies were sought.¹⁸ We should exercise some caution before assuming that more apologies will equate to less litigation.

The intention behind the Bill is clear: to encourage more people to apologise for conduct that has harmed others. It achieves this by rendering such apologies inadmissible in subsequent litigation. It is, however, possible that a greater quantity of apologies may be obtained at the expense of their quality.

Academic commentators have suggested that formal legal protection may work against one of the key features of apologies: genuineness. Two US researchers assert that “evidentiary exclusions rob apologies of their moral content and, in so doing, undermine the sincerity and, ultimately, the healing efficacy of apologies”.¹⁹ Taft suggests that “when apology is cast into the legal arena, its fundamental moral character is dramatically, if not irrevocably, altered”.²⁰ This is forcefully illustrated by Ireland’s Mr Justice Ryan (who chaired that country’s Commission on Child Abuse).

12 Vines (n 4) at 18.

13 C Irvine, R Robertson and B Clark, *Alternative Mechanisms for Resolving Disputes: A Literature Review* (2011) 22-27, available at: http://www.hpc_uk.org/publications/research/index.asp?id=462.

14 T Relis, *Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs, and Gendered Parties* (2009) 142.

15 S J Szmania, A M Johnson and M Mulligan, “Alternative dispute resolution in medical malpractice: a survey of emerging trends and practices” (2008) 26 *Conflict Resolution Quarterly* 71.

16 R C Boothman, A C Blackwell, D A Campbell Jr, E Commiskey and S Anderson, “A better approach to medical malpractice claims? The University of Michigan experience” (2009) 2 *Journal of Health and Life Sciences Law* 125 at 127.

17 At 137.

18 H Genn and A Paterson, *Paths to Justice Scotland* (2001) 186.

19 Jesson and Knapp (n 10) at 31.

20 L Taft, “Apology subverted: the commodification of apology” (2000) 109 *Yale LJ* 1135 at 1136.

Noting that some apologies appeared to have been drafted or heavily influenced by lawyers, he declared it “hard to know whether they were apologising at all”.²¹

This illustrates that clients and lawyers may view apologies in different ways. Lawyers’ training and experience can lead them to view apologies instrumentally, evaluating them according to their likely impact on liability:²²

In contrast to laypeople, who show a tendency to be more amenable to settlement following an apology, attorneys set their aspirations higher and expect more as a fair settlement when an apology is offered.

One Canadian scholar concluded that attorneys and clients occupied “parallel worlds”. Parties repeatedly spoke of the importance of apology and explanation, of hearing and being heard; attorneys attached little importance to these factors.²³ We can surmise that Scottish lawyers may also find themselves conceptualising apologies in terms of their likely effect on damages, whether or not they are evidentially protected. This would defeat the purpose of the Bill, given that legal advice urging caution in apologising is its principal target.

C. CRITERIA FOR AN EFFECTIVE APOLOGY

International evidence and common sense suggest that the definition of an apology is critical. A comprehensive apology is the most desirable.²⁴ A partial or “botched” apology may do more harm than no apology at all.

The Bill defines an apology using three criteria:

- (1) A acknowledges that there has been a bad outcome for B;
- (2) A conveys regret, sorrow or sympathy for that bad outcome; and
- (3) A recognises direct or indirect responsibility for that bad outcome.

It also mentions a fourth: “an undertaking, where appropriate, to review the circumstances which led to the bad outcome with a view to making, if possible, improvements and or learning lessons.”²⁵

The third of these criteria is critical to the Bill. Scholars have examined the importance of fault in a proper apology. Vines puts it trenchantly: “... there is such a thing as a true apology and, whether public or private, an apology is not real unless it includes an acknowledgement of fault”.²⁶ The role of apologies in society includes healing and re-balancing as well as the reinforcing of norms about what is right and wrong. Taft states: “in the context of apology, sorrow is equated with feelings

²¹ *Irish Times*, 13 Feb 2012.

²² J K Robbennolt, “Attorneys, apologies, and settlement negotiations” (2008) 13 *Harvard Negotiation Law Review* 349 at 396.

²³ Relis (n 14).

²⁴ Robbennolt (n 22) found that full apologies were rated more positively than partial apologies by both lawyers and clients (at 21-26).

²⁵ Consultation at 16.

²⁶ Vines (n 9) at 5.

of remorse, shame, and repentance”.²⁷ The admission of fault is critical. Without it, there seems little to be gained by the apology. Most of us regret that bad things happen to other people: but if we cause those bad things the consequences are entirely different. We have a moral duty to put things right.

Apologies that omit admissions of fault will not be recognised by most people as apologies at all. The consultation itself cites the example of Richard Nixon’s “ineffective” apology: “Nixon fails to recognize the wrong he committed, the norm he violated, and in doing so fails to accept responsibility for his own wrongdoing.”²⁸ And yet the Bill specifically excludes protection for admissions of fault. Here is the rub for the proposed Bill:

- if it does not protect admissions of fault, apologies are likely to be expressed in bland, general terms that are more insulting than healing;
- if it does protect such admissions and thus provides complete insulation from legal consequences, even apologies that acknowledge fault may be devalued in the eyes of the recipients.

One of the problems for the Bill (and the law) is the ineliminable link between apology and forgiveness.²⁹ We cannot legislate for forgiveness: yet without it apologies are little more than a PR exercise, expressing sorrow but impressing no-one. What matters in practice is the judgement of the forgiver, inevitably based on factors such as the authenticity of the apology and the belief that the perpetrator is genuinely sorry and will not do it again. It can be argued that, in attempting to remove the negative consequences of apology, the proposed Bill will remove the clearest evidence of genuineness and repentance. How will the recipients know that apologies are real if, as one US article puts it, “My lawyer told me to say I’m sorry”?³⁰ Also important in our evaluation of apologies is action to make things better. In ordinary language, how do I know you are sorry unless you do something about it? The definition of apology needs to include the remedial element, although some would say that this is implied by the words “I’m sorry”.³¹

The guidance on apology issued by NHS Education for Scotland seems helpful.³² It includes “Three R’s”:

- Regret – Meaningful, real, acknowledge wrongdoing; just say sorry; accept responsibility;
- Reason – Be honest – doesn’t mean you will be sued; unintentional and not personal; trying hard to do the right thing;
- Remedy – Next steps – who will do what; investigate to find out why; provide feedback.

²⁷ Taft (n 20) at 1139.

²⁸ Consultation at 32.

²⁹ Taft (n 21) describes apology (at 1143) as “the centerpiece in a moral dialectic between sorrow and forgiveness”.

³⁰ Jesson and Knapp (n 10).

³¹ Taft (n 20) at 1140.

³² NHS Education for Scotland, *The Power of Apology* (2010), available at <http://www.nes.scot.nhs.uk/media/6338/Apology%20Spring%20Focus%202010.pdf>.

Finally, when might apologies take place? Little attention has been paid to this. One possibility is in the immediate aftermath of the “adverse event”. If the Bill is passed, advisors and insurers may alter their longstanding instruction not to apologise; on the other hand they may lack confidence that these spur-of-the-moment, unpredictable apologies will be protected.³³ In that case little will change.

In the weeks and months following the harm what other opportunities exist for apologies to be given? It is difficult to imagine an efficacious apology emerging during litigation and the often lengthy period of agent-led written negotiation that precedes it. When, where and how would it be offered? How would the recipient judge whether it was genuine? The Bill provides no guidance on this and other practical questions, leading this writer to question its claim to provide legal certainty.

One interesting possibility that may address many of the concerns expressed above is the mediation meeting. Handled correctly, apologies given in this forum fulfil a number of the qualities suggested above: there is time for the apologisee to listen to the impact of the harm; s/he speaks directly to the person harmed; and, as well as admitting fault, the apologisee is encouraged to consider remedial action. All of this can take place under existing “without prejudice” protection. The majority of Scottish mediators ask their clients to sign an “agreement to mediate” which contains a detailed confidentiality clause. Typically this provides for the non-compellability of the mediator and the inadmissibility of anything said in the course of the mediation.

With this reassurance in place apologies are not uncommon, and there are no examples, to date, of the Scottish courts attempting to look behind mediation’s veil of confidentiality. While there are undoubtedly some limitations on mediation’s absolute confidentiality,³⁴ these are likely to apply equally to any legislative protection for apologies. The non-compellability of mediators is already provided for in cross-border mediations.³⁵ If this protection were extended to all domestic mediation, much of what the Bill seeks is already available.

D. CONCLUSION

Like any human process, the giving of apologies does not lend itself to legislation. This analysis has attempted to outline some of the risks of unhitching apologies from legal consequences. Given that the Bill may undermine their genuineness; that lawyers may continue to view them instrumentally; that recipients may reject them; and that

33 Vines (n 4) at 23 makes the same observation about the Compensation Act 2006 (which does not apply to Scotland): “A prudent negligence lawyer would not rely on section 2 as a basis for advising clients that it is safe to apologise”.

34 Examples include evidence of a crime, impropriety, fraud and duress. See C Irvine, “Mediation confidentiality: limitations and a proposal” *Kluwer Mediation Blog* 12 Sep 2012, available at <http://kluwermediationblog.com/2012/09/12/mediation-confidentiality-limitations-and-a-proposal/>.

35 Cross-Border Mediation (Scotland) Regulations 2011, SSI 2011/234 s 3.

they may not diminish litigation anyway, it may be wise to exercise caution before legislating. It is to be hoped that the Scottish Parliament will debate thoroughly before taking a step whose impact is so difficult to predict.

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Majority Jury Verdicts

As is well known, the Carloway Review has recommended that the requirement of corroboration in Scottish criminal cases be abolished as an “archaic rule that has no place in a modern legal system”,¹ the retention of which would leave Scots criminal law “deeply steeped in what is essentially late medieval jurisprudence”.² The language of this claim is significant in itself: as John Cairns has pointed out, “medieval” in general usage implies disapproval, whereas the corroboration rule might equally be characterised as “classical”, implying the opposite.³ Describing a rule as either “medieval” or “classical” offers the illusion of an argument at most.

The case for abolishing corroboration cannot rest solely on the antiquity of the rule, but instead whether it serves some useful purpose, regardless of its history. In Lord Carloway’s view, it does not. On his account, the requirement of proof beyond reasonable doubt is “the real protection against miscarriages of justice”.⁴ It follows from this that any other safeguards against miscarriage of justice, such as the corroboration rule, are not only redundant but even counterproductive. If such safeguards serve only to prevent the conviction of persons whose guilt cannot be proven beyond reasonable doubt, they are unnecessary; if they prevent the conviction of persons whose guilt *can* be proven to this standard, they do more harm than good.

As we have argued elsewhere,⁵ this approach places rather too much reliance on the capacity of the standard of proof to operate as a safeguard against miscarriages of justice, particularly as Lord Carloway’s report did not engage in any critical scrutiny of the beyond reasonable doubt test itself. The Scottish Government’s own consultation on Lord Carloway’s proposals is not quite so reductionist, noting other safeguards

¹ Carloway Review, *Report and Recommendations* (2011) para 7.2.55.

² Para 7.1.21.

³ J W Cairns, “Corroboration and the Carloway report – the evil of the medieval?”, *Edinburgh Legal History Blog*, 22 Oct 2012, at <http://www.law.ed.ac.uk/elhblog/blogentry.aspx?blogentryref=9042>

⁴ Carloway Review, *Report* (n 1) para 7.2.41.

⁵ J Chalmers and F Leverick, “‘Substantial and radical change’: a new dawn for Scottish criminal procedure?” (2012) 75 MLR 837 at 863-864. We made extensive criticisms of the Review’s analysis of corroboration (at 849-855) which we will not repeat here.

which already exist in the criminal justice system, and asking expressly whether further changes might be required were corroboration to be abolished.⁶

The Scottish Government has already, before its own consultation ended, stated that it intends to abolish the corroboration requirement – now described as “ancient” – in a forthcoming Criminal Justice Bill.⁷ Since then, the Law Society of Scotland,⁸ the Faculty of Advocates,⁹ JUSTICE Scotland,¹⁰ the Scottish Police Federation¹¹ and the Senators of the College of Justice (Lord Carloway excluded)¹² have all publicly opposed such a change, as the Scottish Law Commission had previously.¹³ This may make no difference: the Justice Secretary’s response to the judges’ defence of corroboration was to describe it as “hardly unprecedented for there to be a divide in legal opinions amongst learned friends”, and to suggest that opposition to the abolition of corroboration is contrary to the interests of victims of crime.¹⁴

A. THE QUESTION

Against this background, our intention is not to debate the merits of the corroboration requirement. Such a debate would appear to have little purpose given the Scottish Government’s commitment to its abolition. Rather, it is to consider whether one specific change might be necessary if it were to be abolished: the modification of the rule that a Scottish criminal jury can return a verdict of guilty based on a simple majority (that is, 8 votes for conviction).¹⁵ Should some form of weighted majority be required as a safeguard against wrongful conviction? Lord Carloway argued that this issue was “not specifically within [the] remit” of the Review,¹⁶ but suggested that

6 Scottish Government, *Reforming Scots Criminal Law and Practice: The Carloway Report* (2012) para 9.26 and Q32.

7 Scottish Government, *Working for Scotland: The Government’s Programme for Scotland 2012-13* (2012) 67.

8 Law Society of Scotland, *Scottish Government Consultation Paper: Reforming Scots Criminal Law and Practice: The Carloway Report. The Law Society of Scotland’s Response* (2012) 20-21.

9 Faculty of Advocates, *Response by the Faculty of Advocates to the Scottish Government on Reforming Scots Criminal Law and Practice* (2012) para 66.

10 JUSTICE Scotland, *Reforming Scots Criminal Law and Practice: The Carloway Report: Response to Consultation* (2012) para 171.

11 Scottish Police Federation, *Briefing Paper: Federation Opposes Lord Carloway’s Proposal to Abolish Corroboration* (2012).

12 Senators of the College of Justice, *Response to the Scottish Government Consultation Paper: Reforming Scots Criminal Law and Practice* (2012) 21-22. The response is available via <http://www.scotland-judiciary.org.uk/24/943/Judges-respond-to-public-consultation-on-Carloway-Report>. That web page specifically notes that the view expressed on corroboration is a unanimous one.

13 Scottish Law Commission, *Report on Similar Fact Evidence and the Moorov Doctrine* (Scot Law Com No 229, 2012) para 1.24.

14 R Dinwoodie, “MacAskill stands by criminal evidence shake-up”, *The Herald* 22 Oct 2012, where it is noted that the Association of Chief Police Officers in Scotland, in a response which did not appear to have been published at the time of writing, had supported the abolition of corroboration.

15 *Allison v HM Advocate* 1995 SLT 24.

16 Para 1.0.20.

change would nevertheless be undesirable, because it would leave open the possibility of a retrial if the jury failed to agree.¹⁷

This is simply wrong. First, it is not clear that even if a retrial were required where the jury failed to agree, this would be particularly problematic. The number of retrials under such a system could be expected to be relatively small: in 1994, the Scottish Office estimated that, were the possibility of a hung jury to be introduced into Scots law, the number of retrials which would take place annually as a result could be expected to be in single figures.¹⁸ Moreover, while retrials are one possible consequence of such a system, they are not an inevitable one. A system which required a weighted majority for conviction could simply take the view that, where no such majority existed, this should mean that the prosecution has failed satisfactorily to prove its case and so the accused should be acquitted. The Scottish courts previously took exactly this approach during wartime, when the size of the criminal jury was reduced and a weighted majority required.¹⁹ At a later date, the Thomson Committee agreed that were a weighted majority to be required for conviction, any failure to attain that majority should result in acquittal with no possibility of retrial.²⁰

These points aside, we would argue that there is a strong case for introducing a weighted majority verdict into Scottish criminal procedure if the corroboration requirement is abolished.²¹ That case has three parts. First, the Scottish simple majority verdict is inconsistent with lay jury systems worldwide. Secondly, it has consistently been justified on the basis that corroboration provides an alternative safeguard against wrongful conviction, a justification that disappears if the corroboration requirement were to be removed. Thirdly, a weighted majority would not significantly reduce the number of convictions, but would operate as a safeguard against miscarriages of justice.

B. THE EVIDENCE

(1) The simple majority verdict is inconsistent with lay jury systems worldwide

Few other criminal justice systems accept that it would be legitimate to convict and punish an individual on the basis of a simple majority verdict. Unanimity has been described in the Supreme Court of Canada as one of the “fundamental characteristics of criminal jury trials”.²² The High Court of Australia has said that the unanimity

17 Ibid. See also Lord Carloway’s evidence to the Justice Committee on this point: Justice Committee Official Report, 29 Nov 2011, cols 543-544.

18 Scottish Office, *Juries and Verdicts* (1994) para 6.5.

19 Administration of Justice (Emergency Powers) Act 1939 s 3; *Mackay v HM Advocate* 1944 JC 153.

20 Criminal Procedure in Scotland (Second Report) (Cmnd 6218: 1975) para 51.12. The committee recommended, however (over the dissent of Gerald Gordon), that a weighted majority should not be required.

21 A view which has some support in the comments of the Senators of the College of Justice: see Senators of the College of Justice, *Response* (n 12) 23-24, suggesting that the abolition of corroboration would mean that “consideration may have to be given to adopting the type of majority required in England, namely 10 out of a jury of 12”. We would suggest that, if the Scottish jury were to remain comprised of 15 members, a requirement of 12 votes for conviction would seem appropriate.

22 *R v Bain* [1992] 1 SCR 91 at [145] read with [146] per Gonthier J (dissenting, but not on this issue).

requirement “constitutes one of the hallmarks of the common law institution of trial by jury”, explaining that:²³

... there is a significant difference in nature between a deliberative process in which a verdict can be returned only if consensus or agreement is reached by all jurors and a process in which a specified number of jurors can override any dissent and return a majority verdict. The requirement of a unanimous verdict ensures that the representative character and the collective nature of the jury are carried forward into any ultimate verdict. A majority verdict, on the other hand, is analogous to an electoral process in that jurors cast their votes relying on their individual convictions... The necessity of a consensus of all jurors, which flows from the requirement of unanimity, promotes deliberation and provides some insurance that the opinions of each of the jurors will be heard and discussed. Thereby, it reduces the danger of ‘hasty and unjust verdicts’. In contrast, and though a minimum time might be required to have elapsed before a majority verdict may be returned, such a verdict dispenses with consensus and involves the overriding of the views of the dissenting minority.

The High Court of Australia went on to observe that “the common law’s insistence upon unanimity reflects a fundamental thesis of our criminal law, namely, that a person accused of a crime should be given the benefit of any reasonable doubt”,²⁴ reflecting the views of Sir Patrick Devlin, who acknowledged the Scottish system in his 1956 Hamlyn lectures but concluded:²⁵

The criminal verdict is based on the absence of reasonable doubt. If there were a dissenting minority of a third or a quarter, that would of itself suggest to the popular mind the existence of a reasonable doubt and might impair public confidence in the criminal verdict.

Over time, concern about one or two members of the jury having undue influence over its verdict (and also concerns about it being possible to tamper with a jury verdict by intimidating a single juror) have caused various jurisdictions to accept weighted majority verdicts, such as the 10:2 verdict which has been permitted in England since the Criminal Justice Act 1967.

Such developments have never gone so far as accepting the simple majority verdict found in Scotland, while in some instances departures even from pure unanimity have been resisted. For example, the New South Wales Law Commission relatively recently examined the rule in that jurisdiction that verdicts must be unanimous, and concluded that it should be retained.²⁶ The New South Wales government did not accept this recommendation, but went only so far as to legislate to permit 11:1 majority verdicts.²⁷ In New Zealand, where unanimity was formerly required, the New Zealand Law Commission gave extensive consideration to the issue, and recommended that majority verdicts be permitted only to

23 *Chealte v R* (1993) 177 CLR 541 at [7], references omitted.

24 At [8].

25 P Devlin, *Trial by Jury* (1956) 56.

26 New South Wales Law Reform Commission, *Majority Verdicts* (Report 111, 2005).

27 Jury Act 1977 s 55F.

the extent of 11:1.²⁸ That recommendation has since been implemented by legislation.²⁹

Perhaps the only major exception (other than Scotland) to the general requirement of unanimity or near-unanimity is found in the Russian criminal jury. Russian criminal juries can return verdicts by a simple majority (seven votes from twelve jurors), but this is counterbalanced by a number of safeguards against wrongful conviction which have no parallel in the Scottish jury system. These are (a) extensive rights to question and object to potential jurors; (b) a minimum period of three hours' deliberation before a vote may take place (a unanimous verdict may be returned before this) and (c) jury verdicts are returned in the form of answers to a questionnaire, thus providing additional information regarding the basis of the jury's decision which is not available in Scotland.³⁰

(2) The Scottish simple majority verdict has consistently been justified on the basis that corroboration provides an alternative safeguard against wrongful conviction

Scotland has been able to maintain a simple majority system because of the corroboration requirement. The Thomson Committee noted that the witnesses who gave evidence to it favouring retention of the simple majority verdict thought it was appropriate because of corroboration (and also the not proven verdict); the Committee itself concluded that a "weighted majority" was "unnecessary in view of the other safeguards which our system provides for the protection of the innocent".³¹

Corroboration has been cited by successive governments as a justification for maintaining simple majority verdicts.³² More generally, the Sutherland Committee saw corroboration as one of the "considerable strengths and distinctive features" of the Scottish criminal justice system which meant that certain safeguards against wrongful conviction which might be necessary in other jurisdictions might not be necessary in Scotland.³³ The view that the simple majority verdict can be justified by reference to the requirement of corroboration has been similarly expressed by academic commentators, albeit with some doubt as to whether this justification should succeed.³⁴ If the corroboration requirement is removed, this justification evaporates and if the simple majority verdict is to be retained, another justification for it must be found.

28 New Zealand Law Reform Commission, *Juries in Criminal Trials* (Report 69, 2001) ch 13.

29 Juries Amendment Act 2008.

30 G Esakov, "The Russian criminal jury: recent developments, practice, and current problems" (2012) 60 *American Journal of Comparative Law* 665.

31 Criminal Procedure in Scotland (Second Report) (n 20) paras 51.06 and 51.12.

32 Scottish Office, *Firm and Fair: Improving the Delivery of Justice in Scotland* (Cm 2600: 1994) paras 3.20-3.21; Scottish Government, *The Modern Scottish Jury in Criminal Trials* (2008) para 7.13.

33 *Criminal Appeals and Alleged Miscarriages of Justice* (Cm 3245: 1996) para 1.24 and *passim*.

34 P Duff, "The Scottish criminal jury: a very peculiar institution" (1999) 62 *Law and Contemporary Problems* 173 at 191-192; G Maher, "The verdict of the jury", in M Findlay and P Duff (eds), *The Jury Under Attack* (1988) 45.

(3) A weighted majority would not significantly reduce the number of convictions, but would operate as a safeguard against miscarriages of justice

A jury does not simply vote; it deliberates. In the course of that deliberation it is to be expected that a particular view of the evidence will in most cases prevail and that all or nearly all the jurors will agree on the verdict to be reached. In England and Wales in 2011, 81 per cent of convictions were reached by a unanimous jury and 19 per cent by a majority.³⁵

It is difficult to compare directly rates of jury verdicts across different jurisdictions, not least because the necessary Scottish statistics are not readily available. In 1994, the Scottish Office's *Juries and Verdicts* paper noted that 18% of persons proceeded against in the High Court, and 14% of persons proceeded against in the Sheriff Court, were acquitted.³⁶ The most recent English statistics indicate that 18.6% of persons proceeded against in the Crown Court are acquitted.³⁷

All this suggests that requiring a weighted majority would not significantly reduce the number of convictions. It would, however, ensure that the weakest cases, where the level of dissent amongst jurors means that the accused's guilt cannot fairly be said to have been proven beyond a reasonable doubt, would not proceed to conviction. In cases where, after deliberation, a significant minority of jurors are not persuaded of the accused's guilt, it would be perverse to allow a bare majority to convict. If the requirement of corroboration is abolished, it would follow that a person could be convicted on the word of A against B, even if 7 of 15 jurors were convinced that B was telling the truth and that it had in fact been shown beyond reasonable doubt that the accused was innocent.

In passing, it might be observed that the requirement of a weighted majority could be expected to have prevented one of the most notorious Scottish miscarriages of justice: as Lord Hunter noted, the guilty verdict returned against Patrick Meehan was understood to have been by either an 11-4 or 10-5 majority, although the size of the majority was not formally recorded.³⁸

C. CONCLUSION

Significantly, the Scottish Government has chosen to ask consultees who propose that the abolition of corroboration should result in further safeguards the stark question: "What evidence do you have to support your position?"³⁹ That question is perfectly reasonable in its own terms, but it seems significant that it is the only time the government has chosen to ask it. Elsewhere in the consultation paper, consultees are expressly invited to consider whether the government should weaken

35 Ministry of Justice, *Judicial and Court Statistics* 2011 (2012) 48.

36 Scottish Office, *Juries and Verdicts* (n 18) 28, table 2.

37 Ministry of Justice, *Judicial and Court Statistics* 2011 (2012) 47-48. This figure has been calculated from the guilty plea rate given on page 47 and the conviction rate in not guilty cases given on page 48.

38 *Report of Inquiry by the Hon Lord Hunter, VRD into the Whole Circumstances of the Murder of Mrs Rachel Ross* (HC 1981/82: 444, July 1982) paras 7.221 n 1, 8.67 and 9.185.

39 Scottish Government, *Reforming Scots Criminal Law and Practice* (n 6) Q32, emphasis in original.

the protection for suspects and accused persons proposed by Lord Carloway.⁴⁰ Those who wish (encouraged by the Government) to take issue with Lord Carloway's recommendations are not exhorted to provide evidence: that requirement is an asymmetrical one.

There is evidence, as we have shown above, but there is a deeper problem: where should the burden of persuasion lie? If the requirement of corroboration were to be abolished without alternative safeguards being put in place, this could leave the level of protection available against wrongful conviction in Scotland at a dangerously weak level. No evidence has been offered to suggest that such a system would be effective at avoiding miscarriages of justice. Such evidence cannot be found in historical practice (as corroboration has always been required in Scottish cases), nor from experience in other jurisdictions which have never chosen to run the risk of permitting conviction by a simple majority on uncorroborated evidence. The onus should be on the Scottish Government to prove that its proposals are a safe way to run a justice system, not on critics to prove that they are unsafe.

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⁴⁰ Ibid Q6 (asking whether it should be possible to detain suspects for a longer time than the maximum limit proposed by Lord Carloway) and Q8 (asking whether it should be permissible to hold a person in custody before a court appearance for a longer time than the maximum proposed by Lord Carloway).